Options for developmental Land Administration Systems in the context of Communal Tenure situations; & implications for Service Delivery

AFRA Association For Rural Advancement

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Mbumba Development Services

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ACRONYMS

BC *Bienes Communales* (a form of customary tenure in Mexico)
CBP Community-based Planning
CBNRM Community Based Natural Resource Management
CPA Communal Property Association in terms of the CPA Act (see below)
DLA Department of Land Affairs
DWAF Department of Water Affairs and Forestry
FBS Free Basic Services
GDI Geo-spatial Data Infrastructure
IDP Integrated Development Plan
KZN KwaZulu-Natal
LAWS:
- **CLaRA** The Communal Land Rights Act, 2004 (Act No 11 of 2004)
- **CPA** The Communal Property Associations Act, 1996 (Act No 28 of 1996)
- **DFA** Development Facilitation Act, 1995 (Act No 67 of 1995)
- **ESTA** The Extension of Security of Tenure Act, 1997 (Act No 62 of 1997)
- **IPILRA** The Interim Protection of Informal Land Rights Act, 1996 (Act No 31 of 1996)
- **LFTEA** The Less Formal Townships Establishment Act, 1991 (Act No 113 of 1991)
- **LTA** The Land Reform (Labour Tenants) Act, 1996 (Act No 3 of 1996)
- **PFMA** Public Finance Management Act, 1999 (Act No 1 of 1999)
- **TLGFA** The Traditional Leadership and Governance Framework Amendment Act, 2003 (Act No 41 of 2003)
- **TRANCRAA** Transformation of Certain Rural Areas Act, 1998 (Act No 94 of 1998)
- **ULTRA** The Upgrading of Land Tenure Rights Act, 1991 (Act No 112 of 1991)

LA Land Administration
LM Land Management
LIM Land Information System
LR&SP Land Reform and Settlement Plan
LEAP Legal Entity Assessment Project
MIG Municipal Infrastructure Grant
NGO Non governmental organisation
O&M Operations and Maintenance
PFR *Plan Foncier Rural* (Rural Land Plan) – West Africa
PTO Permission to Occupy ("old order" right also known as "certificate of occupation")
ROD Registration of Deeds (system)
RWS Rudimentary Water Scheme
SDF Spatial Development Framework
TA Traditional Authority
TC Traditional Council
WSA Water Services Authority

THE BRIEF

The brief is divided into two inter-related sections:

Section 1
The brief refers to South Africa's land administration system as being primarily geared towards **individually owned and registered land** [despite the commitment by government to recognise communal tenure in law]. The brief indicates that the land administration system, seen as a whole, is "not easily adapted to accommodate the range of communal tenures that exist in urban and rural contexts and which are often off-register systems". It states that the system is "inappropriate to meeting South Africa's developmental objectives". It suggests that South Africa's land administration system is primarily geared towards urban environments in which populations live on land that is individually owned and registered in the Deeds Office". The brief requires the presentation of other options that could be "more appropriate for the South African context" with explanations as to "why these may be appropriate, and their pros and cons and what would need to change in the South African system to enable these to be adopted". The brief raises the possibility that "other developing countries may have explored and tested more appropriate land administration systems". "The options presented from these and the lessons learnt could help South Africans identify better ways of organising its land administration systems". The brief suggests that in order to meet developmental objectives, land tenure should be viewed from a wider perspective than legally securing tenure alone. Land tenure should be placed within the context of Land Management broadly and Land Administration arrangements in particular.

Section 2
A second component to the brief raises the problem of service delivery on communal privately owned land, such as land owned by Communal Property Associations. Municipalities frequently allege that it is not possible to deliver services on private land. The problem is compounded by legal and procedural uncertainty. There seems to be considerable ambiguity around this question: there have been cases where services are delivered and there are a number of cases where state officials have maintained that it is "not allowed". It is thus necessary to establish the basis upon which services can or cannot be delivered on communal land; whether this is legal, or extra-legal and to establish "the laws, policies and procedures" such municipalities are drawing to justify service delivery.

SECTION I

1. INTRODUCTION

"Land registration and cadastral surveying in much of the developing world has reached a crossroads. It is not possible to continue with business as usual in the face of massive informality within the world's cities, and new more relevant approaches have to be developed". (Fourie, 2000).

Evidence from all over Africa and indeed, the developing world, suggests that conventional land administration, based on cadastral parcels and registration through centralised titling systems, fails to deliver secure tenure to poor people or people living under customary arrangements. Poor people use other methods to secure their tenure, yet these are not fully recognised in law or in the administrative systems that underpin property. These "other" systems provide access to land to millions of people by operating in the shadows of the law.

The magnitude of this phenomenon, and the failure of registration drives to overcome it, suggests that the time has come to "step out of the box" and seek innovative tools and methods for recognising alternative land use systems in development contexts.

2. Land and property

> **"The amount of time, energy, social, political and economic resources people employ in order to secure, entrench and extend land rights indicates that property is a significant preoccupation amongst ordinary people in … Sub-Saharan Africa". (Lund 2001:159)**

The report considers options in the light of the "lack of institutional fit" between the country's dominant legally recognised land management system and those "other" systems and arrangements that remain beyond its legal and administrative reach. This disjuncture tends to be represented in terms of a dichotomy: the "formal system" versus the "informal system".

Land tenure in South Africa, as in other African countries, is characterized by "legal pluralism", which could be defined as "contradictions between law and local norms". Legal pluralism easily translates into "legal dualism" represented by "western" law and "customary" law, often seen in opposition to one another. In practical terms it means that there are competing authority systems and procedures for securing tenure or transferring land. The state's land administration services are more geared towards the western concept of property. The result is the state spends resources on systems that in reality do not function effectively at local level. At a local level, community authority systems or practices escape the reaches of the law and local (state) management. This in turn affects investment in infrastructure and services. Poor infrastructure and services affects people's ability to access services to support livelihoods, such as transport, marketing, credit,

From the citizens' perspective local practices continue to be under-valued and tenure is perceived to be legally insecure against third parties (e.g. investors, the state itself) even if secure in a day-to-day sense. On the other hand, the ambiguity has certain advantages for both the state and the citizens. The state escapes the high overheads for local land administration in contexts where cost recovery is minimal, while poor citizens escape the financial exactions of the local state.

Legal pluralism is not simply a matter of bureaucratic or administrative disjuncture. It is a manifestation of different conceptions of property. And, as Okoth-Ogendo has stated "… the perception of what constitutes property at any point in a people's history is invariably the product of the total milieu in which they live, rather than of any particular aspect of it" (Okoth-Ogendo, 1989: 7). To fully appreciate why communal tenures have displayed such remarkable resilience to survive, it is necessary to understand "the social philosophy of a people as expressed in their conception of property" (ibid, 15).

In other words, institutional anomalies between "African customary" and "western" property systems are underpinned by broader value systems. It is not simply a matter of one being subsumed by the other.

The conventional interpretation of property in 'western' law conflates tenure security with exclusive rights to a particular spatially demarcated parcel of land. This is called "ownership". This implies that property, ownership and by extension, tenure security, is not present if people do not have exclusive rights to land. Many researchers point out, however, that African systems do display principles of *property*, but that these are not based land rights coinciding with exclusive control (Okoth-Ogendo 1989:8). In illustrating this point, researchers point out that property is not so much a relationship between an owner and the land (or a *thing*), but rather a relationship between people *in respect of* things (Lund 2001,158; Macfarlan, 1998). Using this definition of property, it is easier to see the commonalities between African customary tenure and "western" tenure.

When registration drives are centrally driven, "tenure security" is conflated with "private property", where the owner has the power of alienation. Registration of land is premised on the idea of establishing exclusive ownership. The act of registration is seen as the completion of a process of land acquisition by an owner, signified by a title which ties individuals or combinations thereof to delineated portions of land "in a way that confer[s] both jurisdiction and exclusive control" (Okoth-Ogendo: 7). Under these circumstances the 'act of titling' tends to become an end in itself – as if by this action alone the state assert its authority over land tenure. It disguises the fact that this form of titling land reflects particular norms and values of property that constellate around registration. Without common adherence to these norms and values, the act of registration is likely to be worthless.

New land laws in South Africa do challenge the "absolute ownership" principles assumed to be inherent in the Roman-Dutch common law of property. In terms of post-apartheid land laws it is possible for different sets of rights holders to have different kinds of rights over the same property. However, this different set of values has not been fully tested in the law courts nor made its way into the common law. These laws do not challenge the belief that registration of (exclusive) ownership is legally the highest form of ownership. The new body of land legislation does little to resolve the ambiguity between different property systems.

The ultimate goal of official land administration is thus seen to be the delivery of this (exclusive) form of title – whether to an individual or a corporate structure such as a group under a legal entity. To the extent that the new land laws challenge exclusive ownership, it has had the affect of protecting vulnerable rights during a perceived transitional period, rather than to find common ground between the different property systems or instill the legal system with new forms of property rights (though that might have been the intention). This form of protection is valuable for the poor, but does little to resolve the legal disjuncture.

The legal disjuncture carries over into the entire formal structured land management system[1], including the administration of rights and management of land use. It is manifested in a gap between the actual lived experience of tenure and service delivery in situations served by the formal system and those which fall outside of the framework of registration.

There is increasing evidence that titling in itself does not yield the miraculous transformation of off-register tenures into marketable land assets. On the contrary, a privatisation drive (or even spontaneous privatisation) can increase tenure insecurity, uncertainty and conflict when it occurs in contexts of partial transition - where the concept of private ownership lacks broad social legitimacy. The introduction of exclusivity leads to significant stress and insecurity for the majority. The uncertainty threatens the tenure security of vulnerable people in society in particular (other family members, women, the very poor, orphans, etc). In those circumstances, other types of tenure than 'private' remain more certain for the rights holders (Lund, 2001: 159). In an African context, tenure is characterised by multiple layers of rights where several users may have access to different resources on the land simultaneously according to different social and generational cycles. This pattern of landholding is seldom abandoned when registration drives are introduced.

In this context, private transfers do not entirely replace customary practices, and the overlapping tenure systems lead to considerable institutional uncertainty with regard to authority. "When a non-complementary tenure situation is present in a community, or a state tenure system dominates a local tenure situation, the traditional lines of authority under the customary system are challenged. This creates a situation where there is uncertainty as to what system regulates the resource(s) and who enforces these regulations." (Leisz, 1995).

[1] My use of the term "land management" conveys the country's entire institutional set for managing land, including land policy, laws and organisations.

The significance of this failure to create a legal framework that promotes tenure certainty is that it is occurring at a time when livelihoods crucially depend on access to land. Economic opportunities elsewhere do not absorb those who may be displaced by new tenure regimes. Many arguing in support of private exclusive tenure maintain that investment is unlikely to occur unless a private tenure regime is introduced. However, research has shown that investment is not necessarily contingent on private ownership. There appears to be no neat causal connection between investment and private property. "The link between private property and investment is far from conclusive". (Lund 2001: 154)

These observations are not intended to suggest that privatisation as a spontaneous *process* (as opposed to centrally driven) should be "stopped" or that there is no place for forms of registration in certain contexts, particularly where customary regulation no longer provides the over-arching rationale for access to land and control of tenure. Privatisation processes including monetarised land transactions have been observed all over Africa. It is incorrect to view African tenures as simply innately opposed to alienation of land. What it suggests is that policies need to steer clear of a "one size fits all model" and should rather seek complementary tools fashioned more closely to mirror and support the social processes on the ground, particularly the negotiability and flexibility of local tenure arrangements.

Research from all over Africa suggests that constructive strategies need to build around the negotiability of tenure practices, e.g. by strengthening adjudicatory mechanisms. There is a great need to develop adjudication as a more central function of the South African land administration system. There is neither a law nor a system for land adjudication in South Africa outside of the formalized "paper adjudication" procedures of land conveyancers in the process of formal land transfer for Deeds Registry purposes. Land Rights enquiries come close, but do not provide a legal framework for evaluating different types of evidence.

Other strategies are also needed to *complement* (but not replace) adjudication, particularly where the flexibility of local customary arrangements have mutated or broken down irretrievably. Other forms of recognition, for example, through mapping, boundary demarcation, and local registration of rights holders, or of maps and rules, may well be sustainable interventions if these are locally upheld and if the state provides legal and administrative support. Complementary approaches must provide enforcement mechanisms, which suggests that the entire legal structure should be revisited to accommodate other conceptions of property. In the short term, however, there will be no single path to overcoming legal pluralism.

African states' responses to legal pluralism vary along a continuum characterized by three main thrusts:

- aggressive registration drives by the central state
- laissez faire approach
- complementary approaches

South Africa has attempted to incorporate communal tenures[2] into statute and thereby endorse the concept legally. However, South African policy most closely fits the first tendency, namely, an "aggressive registration" approach. It is suggested that a more successful strategy than either systematic registration or laissez faire is likely to be an approach that seeks complementarity. Examples from Namibia (proposed urban legal reform), West Africa, Mozambique are provided as examples of the latter. A brief summary of reforms in Mexico is included as there are some interesting parallels with South Africa.

[2] For the purposes of this report, "communal tenure" refers generically to "community-based tenures" where access to land is associated with social membership rather than determined by title. It takes many forms.

3. THE LAND MANAGEMENT FRAMEWORK

The state exercises control over the status and transfer of property in many forms, not only through recognition of rights in law. Governments are playing an increasingly active role in trying to regulate patterns of land use "as part of a larger effort to direct the course of economic change" (Berry 1993). In South Africa and other more developed economies of the region, planning and zoning laws; environmental legislation and procedures; sector-specific regulation (e.g. water, electricity, roads); new enlarged local government systems and structures with "development" and service provision functions and with powers to levy rates and taxes; systems of valuation; mortgage and foreclosure, etc. are all implicated in the state's formal property management and administration systems.

The land administration system is part of a larger system of land management in which all the parts interact with one another to function as a whole. It is difficult for individuals who play a role in such a large and complex environment to visualize the whole pattern of change in a system, because they are only a component part of the larger system. (Barry & Fourie, 2002). There is a tendency for different stakeholders to focus on snapshots of isolated parts of the system, but finally it is the whole that should be the focus of analysis. In the formal system, these various 'parts' are able to sustain a relationship with each other through a common recognition or understanding of property, executed through the medium of the cadastre. Cadastral parcels are the "glue" to the sub-components (Kingwill 2003).

Off-register arrangements do not similarly function within a unified "system" for managing land, though they display common principles. To the already complex environment of local (community, village, tribal, etc) authority structures that regulate land access and use, is added the overlay of NGO intervention and state regulation, creating uncomfortable interplay and competition around authority and decision-making.

It is widely assumed that the answer lies in replacing the "informal" systems with the formal land management system. The starting point is usually the movement of off-register or "extra-legal" rights into the registration system, i.e. legalisation of land rights. It is assumed that only when this is achieved, market forces will replace customary practices and promote investment, economic activity, more "efficient" land use, etc. Many researchers refute this "evolutionary" view of land tenure and maintain there is a different logic informing customary and off-register tenures. These are not readily replaced by the market, nor are they compatible with the dominant land management framework – and can thus not easily be absorbed into the formal system - or not in the manner assumed by policy makers.

The implications of the current disjuncture are wide ranging. Land tenure insecurity and uncertainty affects state investment in infrastructure development and service delivery such as housing, roads, electricity, water, sanitation, telecommunications and citizen access to private services, such as credit. These are all implicated in local economic development which is arguably a more important starting point for investment than registration drives.

The divergence between the formal legal land administration system and the various so-called "informal" or "off-register" systems in communal areas, informal and formalising settlements occurs at multiple levels. These are lodged in various 'institutional layers', reflecting different social and political realities around property. Formal arrangements reflect a particular "path to property". In order to fully appreciate the divergence between informal and formal systems it is necessary to compare corresponding steps along the path.

4. LEGAL AND POLICY FRAMEWORK

South Africa's Constitution, as the supreme law of the country, states that all citizens are entitled to basic socio-economic rights, which includes security of tenure, housing and basic

services such as health care, food, water and social security. It recognises the right to land access on an equitable basis.

- Sec 25 (6) states that "a person or community whose tenure is insecure as a result of past racially discriminatory laws or practice is entitled, to the extent provided by an Act of Parliament, either to tenure that is legally secure or to comparable redress.
- Sec 26 (1) states "everyone has the right to have access to adequate housing".
- Sec 27 (1) states "everyone has the right to health care services…. sufficient food and water and social security……"

The Bill of rights asserts that the state must take "reasonable legislative and other measures within its available resources to achieve the progressive realization" of each of these rights. With regard to land it states that the "State must take reasonable legislative and other measures within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis"….Parliament must enact legislation to effect legally secure tenure for all (or comparable redress). "No one may be deprived of property except in terms of law of general application …". Other relevant rights include the right to a safe environment and protection of the environment for the benefit of future generations.

Sectoral policies have led to various new laws to activate these rights. These reflect the way in which state departments interpret their obligations to bring about the "progressive realisation of these rights". The White Paper on South African Land Policy (1997) recognises the land rights as contained in the Constitution, an important recognition being the "diversity of tenure" – the implication being the recognition of different property rights. Diversity of tenure is particularly important in Africa with its challenge of legal pluralism.

A progressive body of land laws has been enacted to give effect to these land rights. An important principle in the new corpus of land law has been the extension of land rights to occupiers. According to one interpretation, these are "prescription-like devices … which protect the status quo of possession on an interim basis" (Carey Miller, 2000, 207) pending formalization into permanent real rights. In other words, they are *pre-emptive rights* but not real rights. However, these rights cannot be removed without due process, such as consent, comparable redress, expropriation and compensation, which implies strong property rights.

A second principle has been the enactment of various enabling laws to allow for the upgrading of these rights into "full ownership" for groups and/or individuals.

Criticism points to the lack of an intermediate between these two. Policy frames all tenures within the overall formal land management template with ownership at the top of a hierarchy of rights. The legal innovation lies chiefly in the accommodation of group tenures and recognition of occupational rights, but these rights only receive full legal recognition upon movement into the realm of "ownership" as defined by Roman Dutch principles of property.

This interpretation of the Constitutional rights to secure tenure amounts to equating tenure security with privatisation of land rights in ownership. Rights of occupation are protected in the interim, pending ultimate transfer into a private exclusive state. The effects of this interpretation of secure tenure lie in the fact that the entire formal land management template of the country is designed around 'land registration' understood as exclusive ownership - for land administration purposes linked to a uniform cadastral infrastructure.

This report highlights some of the "down-stream" administrative and implementation problems that occur with this interpretation and approach, viz.:

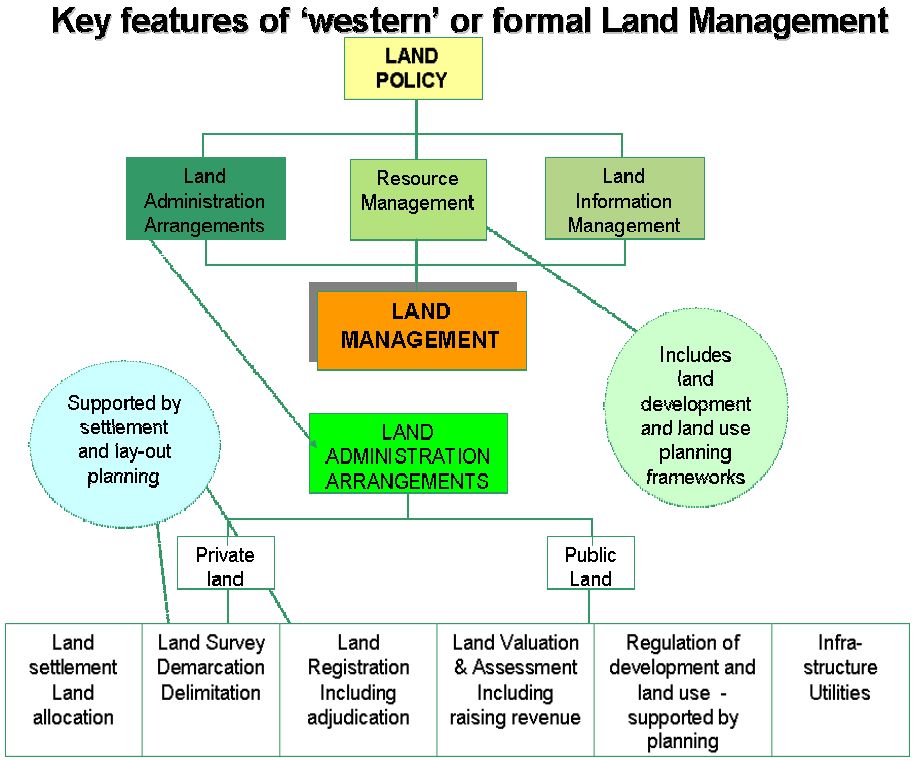
- Administrative disjuncture
- Planning disjuncture
- Persistence of delivery backlogs

4.1 ADMINISTRATIVE DISJUNCTURE

It is not possible to register land without the associated formalities, viz., planning, zoning, surveying, adjudicating, conveyancing, updating land information, valuing, taxation, etc.

The requirements for maintaining this system are inter-related – the parts maintain the whole and the whole is sustained by the parts. The organisation of the system is hierarchical. Parts are centralised and others decentralised. Private sector professionals account for significant delivery of land administration services (e.g. surveying, planning and conveyancing) though their standards and activities are regulated by the state. The coherence of the system is sustained by land parcellisation, viz., for each delineated property there is corresponding owner (individual, corporate or state).

Figure 1



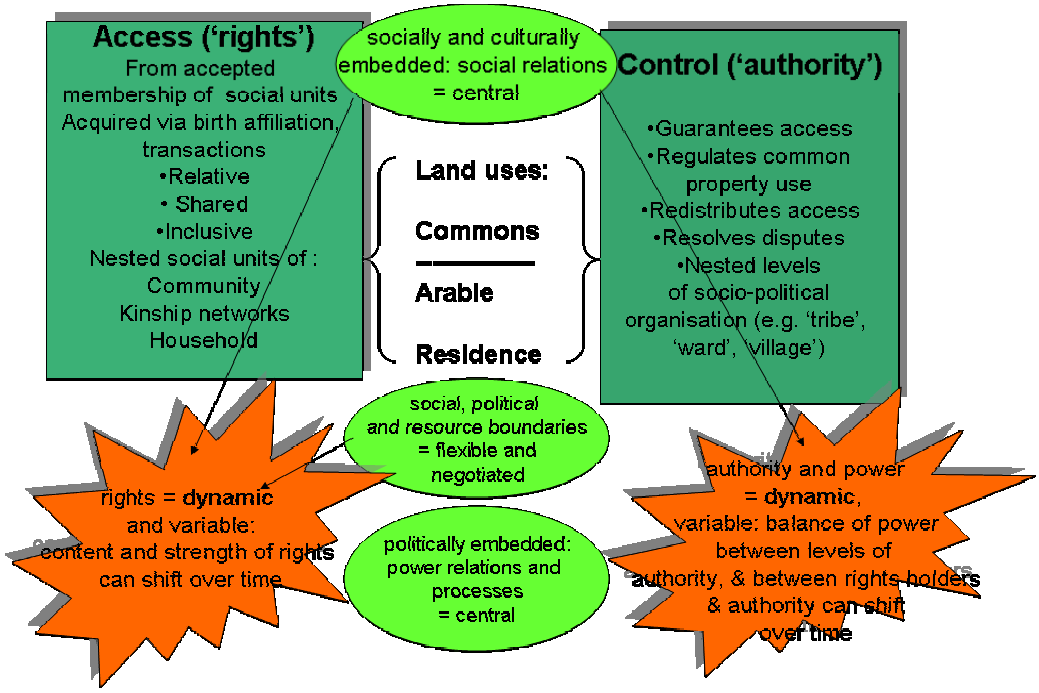
Source: Kingwill, R. 2003 (adapted from Dale and McLaughlin 1988)

The system requires high accuracy and maintenance, and a sophisticated land information system with mechanisms to trace each parcel of land to a registered owner, whether single or corporate; private or state. The failure of any one part affects the whole. E.g. if the registry is not *current*, the land information system is compromised, leading to loss of faith in the entire system by its users - mainly public and private service deliverers, such as state departments, planners, conveyancers, surveyors, banks, etc.

The formal system is thus suited to accurate land parcels cross-referenced with current registry information, which must be possible to maintain every time there is a change in the parcel (e.g. subdivisions or consolidations) or ownership (transfers). It is unsuitable where land cannot be divided into parcels and is thus without an owner traceable to each parcel.

The figure below represents principles of African land tenure. Colonial state intervention shifted the balance of power from rights holders to traditional authorities in respect of power over land allocations. Current traditional authority systems in this respect do not accurately convey the historic principles of African tenure relationships.

Figure 2. Key features of African land tenure



Source: Cousins, B. 2005

Box 1. African land tenure systems showing the centrality of social relationships

African land tenure systems derive from embeddedness in social relations. In pre-colonial societies social embeddedness meant that (a) land rights were derived primarily from membership of social groups, and could be acquired via birth, affiliation and a variety of transactions including alienation; (b) they were shared and relative rights, and were nested within a variety of social units; (c) land rights were both 'individual' and 'communal' in character, but the relative emphasis between these was both variable and subject to change; (d) the role of socio-political authorities (such as traditional leaders) was essentially to guarantee the rights deriving from group membership and to help resolve disputes, as well as regulate common pool resource use. These features meant social and territorial boundaries were inherently flexible and subject to negotiation between individuals, families and groups, and the content of land rights was dynamic and variable over time. The underlying function of the land tenure regime was to guarantee the right of access of all to the fundamental resources needed to provide a livelihood, and they were thus **inclusive** rather than exclusive in character.

Embeddedness within power relations meant that the balance of power between different interests in relation to land could shift over time resulting in: (a) changes in the relative strength of men's and women's rights to land; (b) changes in the relationship between nested levels of socio-political organisation (e.g. between chiefs and headmen, or headmen and household heads); and (c) changes in power relations between authorities and rights holders.

Social, economic and power relations in African societies were deeply affected by the transition to colonial rule. This resulted in the following … sometimes contradictory processes and adaptations: (a) greater stress on individual/family rights and decision-making; (b) defensive stress on group-based nature of land rights; (c) redefinitions of women's land rights as 'secondary' and subordinate to … husbands and men, rather than deriving from social status; (d) chiefs and headmen becoming the symbol of resistance to colonial rule and land loss; (e) chiefs and headmen used as instruments of indirect rule and acquiring greater powers over land than previously enjoyed; (f) the erosion of mechanisms that constrained the power of traditional leaders and kept them responsive to rights holders - replaced by 'upward accountability' to the state, often resulting in abuse and corruption.

Extract from Cousins, B. 2005

Figure 2 shows “access” elements that are to do with the extent and duration of the powers of rights holders; while the “control” elements signify issues relating to the authority to regulate these powers or land rights. Cousins (2005) questions the idea that 'allocations' by authorities are, or should be, the source of rights. “Traditional leaders in pre-colonial systems were often forced to be 'downwardly accountable' to a degree, and the strong land rights of 'commoners', that derived from their claims as 'citizens' rather than from allocations from 'above', may have underpinned this accountability. If this is the case, then strengthening traditional leaders' control of land will tend to subvert these accountability mechanisms, as indeed occurred under colonial rule” (ibid). The broad reality remains far greater fluidity in land tenure relations than the formal property system. This does not mean an absence of property, but there is not a “coincidence of power and exclusivity of control in any individual or group of individuals” (Okoth-Ogendo, 1989:8) and no identifiable land parcels associated with such individual(s), as in most western systems.

The Constitution does not distinguish between property systems and policy endorses diversity of tenure. However, the *effect* of law and policy is the domination of the common law of ownership. This affects state organisational structures and land administration at all levels of state and private regulation. The result is legal *and administrative* disjuncture. Not all rights are treated equally and not all holders benefit from coherent land administration.

Figures 3 and 4 below illustrate the “two streams” of land management in the formal system (Kingwill, 2004). Access rights in the form of ownership are registered in the central Deeds Registry based on surveyed parcels of land under the regulation and custodianship of the Surveyor General. *Use* of these land rights is regulated and managed mostly by local government, under the guidelines of national norms and standards according to land use planning frameworks and sectoral requirements. Zoning and water laws constrain what an owner can do on the land. Management occurs locally, regulated or guided by national laws.

This centralised-decentralised system of rights and resource management is held together by a land information system based on cadastral parcels.

Figure 3. Formal legal system of land registration and regulation of use

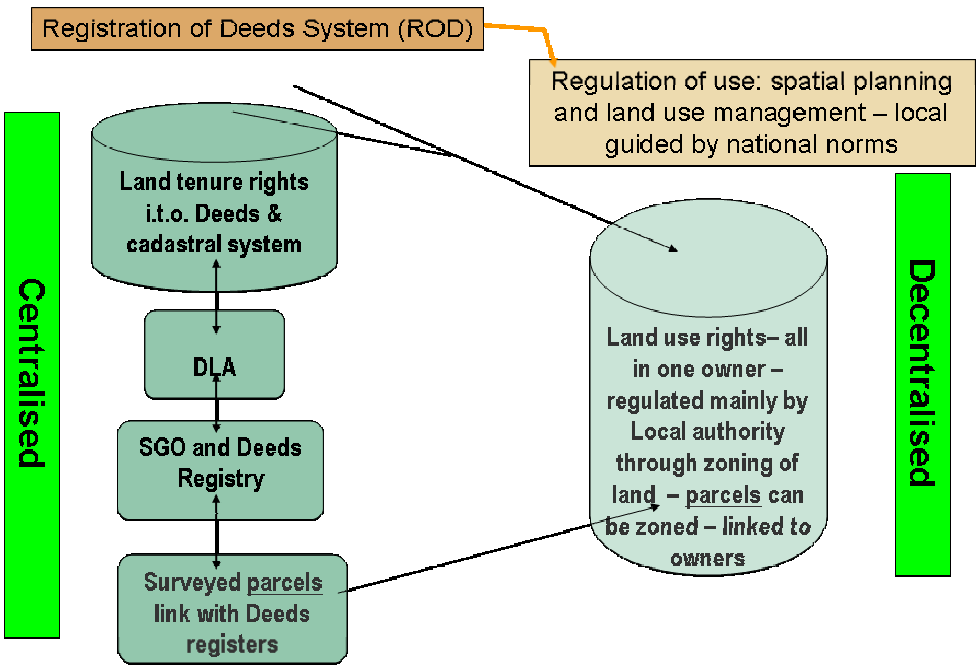
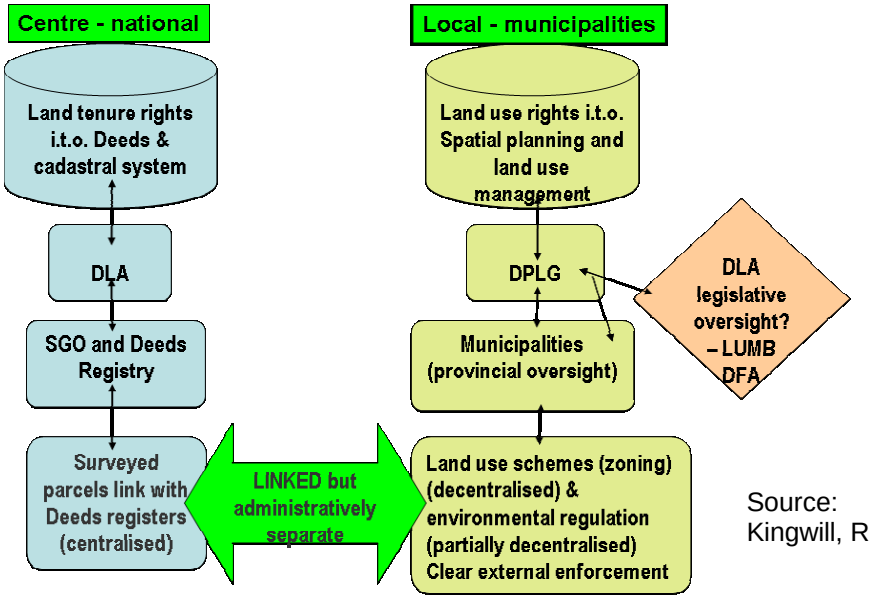


Figure 4. Conventional Regulation of Tenure/land use: "two streams"

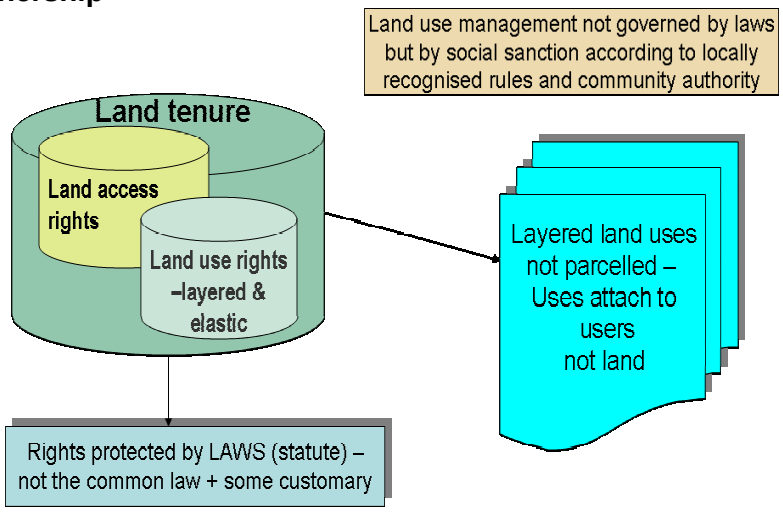


Source:
Kingwill, R. 2003

In "informal systems" however, management does not generally follow this territorial person-parcel paradigm, and use rights are part and parcel of the powers granted to rights holders to access the land. Rights holders' use of a certain resource is the same as their land right; and different rights holders may access the same resource simultaneously. Thus use rights attach to the person(s) and not to the parcel: regulation of use rights is *not separated* from regulation of access. Many hybrid tenures introduced by colonial authorities, in particular, quitrent and Permission to Occupy (PTOs) followed a similar principle. Under zoning in the western land management system, on the other hand, use rights attach to the parcel[3].

Figures 5 & 6 below represent this difference in land use regulation. The coherence and co-ordination of the formal system results from the link between regulatory mechanisms and land parcels. African systems of use rights, on the other hand are layered and overlapping, with several users having access to the same pieces of land simultaneously; hence the user is "managed" through social relationships rather than as the exclusive owner of a "thing".

Figure 5. Customary and hybrid systems, protected by Statute; upgradeable to ownership



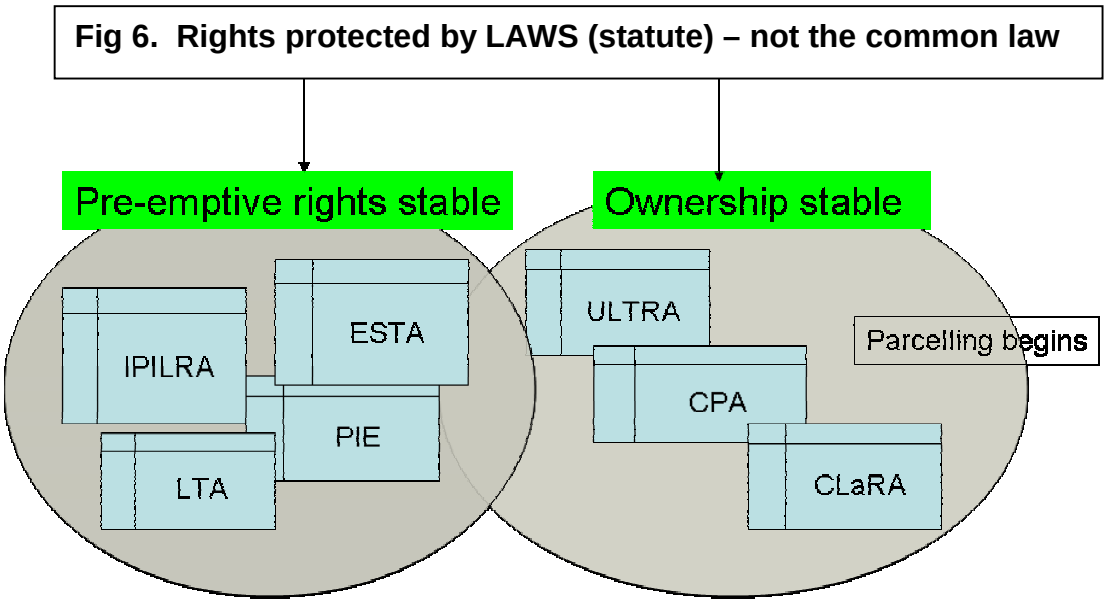
[3] Acknowledgement to Jan Barnard, MXA, for this insight.

New statutory rights granted to occupiers of state and private land (i.e. land registered in the name of a private owner or the state) are property rights to the extent that holders thereof cannot be deprived of these rights without compensation or equitable redress, but they do not get full recognition by the system as a whole until converted into registered rights.

On the other hand are a set of laws that enable the movement of certain tenures into "full ownership". In order for this to happen, formal planning, surveying and conveyancing must take place, usually after "rights enquiries". This implies that land parcels must be created. These activities do not necessarily transform property into exclusive private property, and in many cases the changes are cosmetic. There is much evidence of the tendency by rights holders to revert to local practice after formalisation: a large percentage of the records and registers lapse after initial registration, rendering registers non-current. The legal and administrative costs of updating records are extremely high. Special legal mechanisms[4] to do this have been a feature of both pre- and post-apartheid legislation. The costs of the enquiries and register-updates are borne by the state – the procedures for tracking ownership lineages are onerous. The need for special legislation to regularise the registry records is admission by the state of the weaknesses in titling programmes over time.

The figure below illustrates the two "stables" of statutory land law in South Africa.

Fig 6. Rights protected by LAWS (statute) – not the common law



Both stables confer "holding pen" status on land tenure rights pending formalisation through planning, parcellisation and registration, i.e. full recognition follows conversion to "ownership" in the common law interpretation of the concept.

South African policy makers and legislators have attempted to address the dilemmas and practical problems of legal pluralism and diversity by conceiving of an integrated land management system. The integration, however, is expected to occur when informal tenures are transformed into formal tenures. There is no expectation on the formal management system to change in order to accommodate other property systems.

[4] Sections 7 and 8 of the Native Administration Act, 1927; Land Titles Adjustment Act, 111 of 1993